



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS DENIED: February 2, 2012

CBCA 2349

WHITERIVER CONSTRUCTION, INC.,

Appellant,

v.

DEPARTMENT OF THE INTERIOR,

Respondent.

Karen A. Palecek and Tabitha R. Myers of Palecek & Palecek, PLLC, Scottsdale, AZ, counsel for Appellant.

Sarah T. Zaffina, Office of the Solicitor, Department of the Interior, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **HYATT**, and **DRUMMOND**.

HYATT, Board Judge.

This appeal arises from a contract awarded by the Department of the Interior (DOI) to appellant, Whiteriver Construction, Inc. (Whiteriver). For the second time, the Government has moved to dismiss a Whiteriver appeal for lack of jurisdiction and, again, appellant has agreed with the Government's position, requesting that the matter be dismissed without prejudice to reinstatement once Whiteriver has cured the defect alleged by DOI. For the reasons stated, we find that the Board has jurisdiction to entertain the appeal and deny the motion.

Background

DOI awarded contract number CMN00070001 to Whiteriver for highway construction services at the Navajo Indian Reservation in White Cone, Arizona. The contract called for grading, draining, and paving of 1.43 kilometers of roadway. DOI conducted a final inspection of the construction work on October 23, 2008. The work was deemed to have been satisfactorily completed and final acceptance of all work occurred on December 3, 2008. The contract included the Disputes clause set forth in Federal Acquisition Regulation (FAR) clause 52.233-1, 48 CFR 52.233-1 (2008).

On January 19, 2009, Whiteriver submitted documents to support additional costs it believed the Government owed it under the contract. The agency performed an audit and concluded that an “as-built” modification should be issued. On December 7, 2009, the contracting officer informed Whiteriver that DOI would make a final payment of \$99,874.06 for the work performed on the contract. On December 11, 2009, Whiteriver wrote a letter to DOI seeking further explanation about the audit and expressing the hope that once the parties could agree on a methodology for calculating the final payment they could negotiate a mutually acceptable final payment amount. This letter did not identify a specific amount that Whiteriver was seeking, nor did it include a certification of any claim.

The contracting officer responded to Whiteriver’s letter in a letter dated March 18, 2010, in which the audit findings were detailed and an explanation was provided for how the contracting officer determined the final payment amount. The contracting officer adjusted the amount to be paid, increasing it to \$107,478.62, and then advised that this was the “final Contracting Officer’s decision.”

On June 15, 2010, Whiteriver appealed the contracting officer’s decision to the Board, claiming entitlement to the amount of \$342,483. That appeal was docketed as CBCA 2045. Following a telephonic conference, the Government moved to dismiss the appeal on the ground that the Board lacked jurisdiction because the claim presented to the contracting officer exceeded \$100,000 and had not been certified. Appellant did not oppose the motion.

On October 25, 2010, shortly before the issuance of the Board’s decision dismissing the appeal for lack of jurisdiction, *Whiteriver Construction, Inc. v. Department of the Interior*, CBCA 2045, 10-2 BCA ¶ 34,582, Whiteriver sent a letter to the contracting officer, denoted a “final certified claim,” stating the following:

In order to ensure that the record is complete for our appeal of your “final decision” of March 18, 2010, please allow the enclosed records and

correspondence to serve as a complete “claim” pursuant to the requirements of 41 U.S.C. § 605(a) [recodified as § 7103(a)].

The claim was accompanied by a certification, in the amount of \$340,785.69, executed by Whiteriver’s Vice President and Chief Executive Officer. The letter concludes with the statement: “Thank you for your attention to this request to complete the record for appeal.”

The contracting officer did not issue a decision in response to this letter, and in March 2011, Whiteriver filed a new appeal at the Board based on the deemed denial of its certified claim filed on October 25, 2010. The Government filed another motion to dismiss for lack of jurisdiction on the ground that the communication submitted to the contracting officer filed by Whiteriver did not meet the CDA requirements for the submission of a claim. Alternatively, the Government argues that the matter is not ripe for appeal.

Discussion

Under the Contract Disputes Act (CDA), 41 U.S.C.A. §§ 7101-7109 (West Supp. 2011) (previously 41 U.S.C. §§ 601-613 (2006)), a “claim by a contractor against the Federal Government relating to a contract [shall be in writing and] shall be submitted to the contracting officer for a decision.” *Id.* § 7103(a)(1). The standard Disputes clause under the FAR defines “claim” as “a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to this contract.” 48 CFR 52.233-1(c); *accord* 48 CFR 2.101. The Court of Appeals for the Federal Circuit has established that, for jurisdictional purposes, a CDA claim exists for a nonroutine contract adjustment if there is: (1) a written demand, (2) seeking, as a matter of right, (3) the payment of money in a sum certain. *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1575 (Fed. Cir. 1995) (en banc).

The Government argues that appellant’s letter dated October 25, 2011, was insufficient to invoke the Board’s jurisdiction under the CDA. Respondent contends that the letter was simply a request to supplement and complete the record in the existing appeal, modifying the amount of the claim to \$340,785.69. In addition, respondent points out, the letter did not specifically request a final decision from the contracting officer.

With respect to the Government’s argument, the Board has recently observed:

While no particular wording is required for a claim, it must contain “a clear and unequivocal statement that gives the contracting officer adequate notice of the basis and amount of the claim.” *Contract Cleaning Maintenance*,

Inc. v. United States, 811 F.2d 586, 592 (Fed. Cir. 1987). Additionally, the claim must indicate to the contracting officer that the contractor is requesting a final decision. See *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387 (Fed. Cir. 1987); *James M. Ellett Construction Co. v. United States*, 93 F.3d 1537, 1543 (Fed. Cir. 1996). The request may be either explicit or implicit, so long as what the contractor desires by its submissions is a final decision. *Id.* To make this determination, the Board looks at the totality of the correspondence, including the submissions and the circumstances surrounding them. See *EBS/PPG Contracting v. Department of Justice*, CBCA 1295, 09-2 BCA ¶ 34,208; *Guardian Environmental Services, Inc. v. Environmental Protection Agency*, CBCA 994, 08-2 BCA ¶ 33,938. The intent of the communication governs, and a common sense analysis must be used to determine whether the contractor communicated his desire for a contracting officer's decision. *Guardian Environmental Services, Inc.*, 08-2 BCA at 167,946.

Red Gold, Inc. v. Department of Agriculture, CBCA 2259, slip op. at 3-4 (July 6, 2011).

Here, the prior appeal was dismissed for failure to certify a claim in excess of \$100,000. In the process of addressing the jurisdiction issue raised in the prior appeal, appellant made clear its intent to rectify the failure to certify its claim and to reinstate or file a new appeal as soon as possible. Although appellant apparently believed that it could reinstate the existing appeal rather than file a new one, there is no doubt that appellant wanted to pursue the claim arising from the facts that gave rise to the contracting officer's original attempt to issue a decision. After reviewing the totality of the circumstances in this case, which includes the documents, and the clearly manifested intent of Whiteriver to pursue its claim, we conclude that the October 25 correspondence is a cognizable claim and that Whiteriver properly appealed the contracting officer's deemed denial of that claim.

In the alternative, the Government contends that because the letter was sent to the contracting officer prior to dismissal of the pending appeal, the matter is not ripe for adjudication. The ripeness doctrine is intended to bar premature adjudication of hypothetical or abstract issues. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967); *Walker Equipment v. International Boundary and Water Commission*, GSBCA 11527-IBWC, 93-3 BCA ¶ 25,954. Respondent fails to persuade us that this doctrine has any application to the facts before us. Even if the Government could reasonably have construed a letter directed to the contracting officer to be provided for the purpose of completing the record in CBCA 2045, it was understood by the parties and the Board that a decision on the certified claim would be appealed and the record already provided to the Board would carry over to the new appeal. A common sense interpretation of the context and circumstances supports the

conclusion that Whiteriver was seeking to perfect its ability to file a new appeal by presenting the contracting officer with a properly certified claim.

Although respondent appears to believe that the pending appeal prevented it from rendering a decision on the certified claim presented in the letter of October 25, 2010, this is not the case. Once the claim was submitted, the contracting officer was required to issue a decision on it or notify the contractor of a reasonable time in which the decision would be issued. 41 U.S.C.A. § 7103(f)(2). The pendency of an appeal over which the Board had no jurisdiction has no bearing on this requirement. Whiteriver waited nearly four months for a contracting officer's decision before appealing the deemed denial of its claim. The claim is neither hypothetical nor abstract. Respondent's reliance on this doctrine is misplaced.

Decision

The Government's motion to dismiss is **DENIED**.

CATHERINE B. HYATT
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

JEROME M. DRUMMOND
Board Judge